STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ALEXIS DANIELLE FLETCHER, Minor.

MARK FLETCHER,

Petitioner-Appellee,

v

BEVERLY J. PARSEL,

Respondent-Appellant.

UNPUBLISHED
October 16, 2003

No. 247113
Mecosta Circuit Court
Family Division
LC No. 02-001014-AD

In the Matter of DESTINY NICOLE FLETCHER-TAYLOR, Minor.

MARK FLETCHER,

Petitioner-Appellee,

v

BEVERLY J. PARSEL,

Respondent-Appellant.

No. 247114
Mecosta Circuit Court
Family Division
LC No. 02-001013-AD

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

In these consolidated cases, respondent appeals as of right from the trial court orders terminating her parental rights to Destiny under MCL 712A.19b(3)(f), and to Alexis under MCL 710.51(6). We affirm.

I. Material Facts

Petitioner is Alexis' biological father, and on May 31, 2002, when the petitions that led to the terminations at issue were filed, was Destiny's guardian. Respondent is the biological mother of both minor children. Petitioner and respondent had an intermittent relationship until 1996.

In November 1996, when Alexis was nine months old and Destiny was 3½ years old, respondent went to a Red Lobster restaurant with the children to have dinner with petitioner. Upon her arrival, she was arrested by local police on an outstanding 1992 warrant against her for the delivery of cocaine. Petitioner had informed the police of respondent's whereabouts that particular night. In March 1997, respondent was sentenced to prison for a minimum term of three years and a maximum term of twenty years.[1]

After obtaining physical custody of Destiny, petitioner filed for a guardianship over her in the Ionia Circuit Court. Petitioner attempted to serve the petition on respondent by mail to the Scott Correctional facility. The petition was granted on December 3, 1997. On December 4, 1997, petitioner received respondent's copy of the petition back with an indication that it was undeliverable.[2]

While in prison, respondent had sporadic contact with the children, who resided with petitioner.[3] It was undisputed at trial that respondent had not had contact with her two daughters since sometime in 1998. Respondent was paroled on June 9, 1999.

Prior to her parole, petitioner filed an ex parte petition in the Ionia Circuit Court seeking a Personal Protection Order (PPO). The petition was granted, and a PPO was entered against respondent on May 26, 1999. The PPO precluded respondent from removing the children from petitioner's custody and from contacting petitioner, but with respect to the minor children, only precluded respondent from threatening to kill or physically injure them. The PPO contained no provision precluding respondent from communicating with or contacting the children or from visiting them away from petitioner's home. As a condition of parole, however, the parole board required respondent to avoid any contact with petitioner or the children.

Sometime in late 2001 or early January 2002, respondent filed an amended motion to terminate the PPO. Although the court did not terminate the PPO, it entered an amended order specifically indicating that the PPO was not intended to prevent respondent from exercising any parental rights that may be afforded to her by a court having jurisdiction over the minor children. The amended order provided, in pertinent part:

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[1] Respondent was in jail from the time of her arrest until the time of her sentence.

[2] Apparently, just several weeks before the petition was filed and mailed, respondent had been transferred to a Kansas state prison to face charges in that state, and her mail was not automatically forwarded to her.

[3] The trial court found, and there was evidence supporting such finding, that while in jail in November 1996, respondent instructed her sister to allow Destiny and Alexis to live with petitioner rather than with respondent's mother.

> The Court notified the respective parties and their attorneys in open Court at the hearing held on January 9, 2002 that the Personal Protection Orders issued in this case . . . and in the case of [petitioner's mother] . . . *are not intended to prevent the Respondent from exercising parental rights and privileges with her two children presently residing with Petitioner* . . . .
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> The Personal Protection Order entered in this case on May 26, 1999, and any Amendments thereto, *are not intended to prevent the Respondent . . . from exercising visitation, parenting time, custody and any communications, with her children as shall be authorized/ordered by a Judge of the Ottawa County Circuit Court or by any other Judge of a Court having jurisdiction over matters involving these two children*. . . .
>
> Pending further Order of this Court, the terms and conditions of said Personal Protection Order entered in this case on May 26, 1999, and any Amendments thereto, shall remain in full force and effect, except as specifically clarified as hereinabove provided.[4]

Respondent never filed any action in circuit court seeking custody or parenting time with the children. However, after she was paroled, respondent repeatedly went back to jail and prison. It was undisputed that between June 1999 (when respondent was paroled), and January 21, 2003 (the date of trial), respondent was imprisoned three times and jailed six times. Respondent also held six to seven different jobs during that time.

On May 31, 2002, petitioner and his wife[5] filed: (1) a petition seeking a stepparent adoption of Destiny; (2) a petition seeking to terminate respondent's parental rights to Destiny; (3) a petition on behalf of petitioner's wife for the stepparent adoption of Alexis; and (4) a supplemental petition to terminate respondent's parental rights to Alexis. In her answer and affirmative defenses, respondent generally denied that a statutory basis existed for termination, and separately alleged that (1) she had not received notice of the Ionia guardianship proceedings, and (2) she had no notice that the guardianship proceedings were transferred to Mecosta County.

On February 6, 2003, the Mecosta Probate Court, sitting as a Family Division judge of the circuit court, issued two separate written opinions and orders terminating respondent's parental rights to both Alexis and Destiny. Regarding Destiny, the court found that petitioner was her guardian and that respondent had failed to provide regular and substantial support in the two years preceeding the termination petition, and that respondent had the ability to visit, contact, and communicate with the child, but had failed to do so in the same two-year period.

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[4] In June 2002, respondent filed another motion to terminate. It was denied with respect to petitioner, but the circuit court did terminate the PPO that had been issued against respondent that prohibited her from having any contact with petitioner's mother.

[5] Petitioner was married in December 2000, and moved with the children from Ionia to Mecosta county. Petitioner informed the Ionia Circuit Court of the move because of the guardianship and also informed respondent's two sisters of his new address. However, petitioner requested that the Ionia Circuit Court keep his change of address confidential.

Except for the finding of an existing guardianship, the trial court's findings were the same in its opinion dealing with Alexis.

II. Analysis

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 5.974(I);[6] *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous when the reviewing court is left with a firm and definite conviction that a mistake has been made. *Jackson, supra* at 25. Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights unless the court finds from evidence on the whole record that termination is clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000). The trial court's decision regarding the children's best interests is reviewed for clear error. *Id.* at 356-357.

The trial court terminated respondent's parental rights to Destiny under MCL 712A.19b(3)(f), while her rights to Alexis were terminated pursuant to MCL 710.51(6). Although they are separate provisions, both sections provide essentially the same grounds for termination. MCL 712A.19b(3)(f) provides:

> (f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:
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> (i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
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> (ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

MCL 710.51(6) provides:

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody

[6] Effective May 1, 2003, the court rules governing proceedings regarding juveniles were amended and moved to the new MCR subchapter 3.900. The provisions on termination of parental rights are now found in MCR 3.977. In this opinion, we refer to the rules in effect at the time of the order terminating respondent's parental rights.

> of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

Under the language of both statutes, a court is to consider the respondent's contributions and contacts during the two years preceeding the filing of the petition. MCL 712A.19b(3)(f); MCL 710.51(6); *In re ALZ,* 247 Mich App 264, 273; 636 NW2d 284 (2001).

In this case, the trial court's findings that respondent had the ability to contribute to the children but failed to do so since at least May 2000, and that respondent had the ability to visit, contact, or communicate with the children but failed to do so since May 2000, were not clearly erroneous. There was sufficient evidence presented to the trial court that supports its conclusion that respondent had the ability to support or assist in the support of the minor children. The evidence revealed that, since her parole in June 1999, respondent held six or seven different jobs, yet never sent any money or gifts to support or assist in the support of the children. Moreover, even when respondent was returned to prison and jail, she could have earned some income and provided some assistance to the minor children. *In re Caldwell,* 228 Mich App 116, 121; 576 NW2d 724 (1998).

Respondent's main contention is that the trial court erred in its conclusion that respondent had the ability to visit, contact, or communicate with the minor children. Specifically, respondent contends that she was unable to communicate, contact, or visit with the minor children because of the PPO obtained by petitioner and because of the no-contact provisions of respondent's parole, which were also the indirect result of petitioner's actions. We disagree.

We believe the record in this case supports the trial court's conclusion that, in the two years preceeding the filing of the petition, respondent had the ability to contact, visit, or communicate with the children but, without good cause, "regularly and substantially failed or neglected to do so." MCL 712A.19b(3)(f); MCL 710.5(6). Indeed, the evidence revealed that the PPO did not specifically preclude respondent from contacting or visiting with the children. Furthermore, after respondent moved to terminate the PPO, the trial court entered an amended order specifically informing her of that fact, i.e., that the order was not intended to interfere with her parental rights to custody or parenting time as may be granted by a court of competent jurisdiction. Nevertheless, respondent failed to file any motion or institute a custody proceeding in order to obtain relief, and nothing in the record indicates that she was precluded from accessing the courts. This critical factor significantly differentiates this case from *ALZ, supra,* where the respondent, prior to the establishment of his paternity of the child, stood as a stranger

to the child and "had no legal right to visitation or communication with the child." *Id.* at 274. Here, respondent had parental rights to both children, but for whatever reason, opted not to seek to enforce those rights in court. Additionally, we note that respondent never sent any communications or gifts to the children, directly or indirectly.

Regarding the conditions of her parole, respondent admitted that she did not file a formal, written request with the parole board asking that the no-contact provision be deleted until her attorney did so almost two months after the petitions were filed. Although respondent testified that she spoke with several agents about removing the condition when she was first released on parole, she had no documentation of those conversations and the agents that did testify had no knowledge of any such requests. Under the clearly erroneous standard, we defer to the special ability of the trial court to assess the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

After carefully reviewing the record, we are satisfied that the trial court did not clearly err in finding that § 19b(3)(f) and § 51(6) were established by clear and convincing evidence. MCR 5.974(I); *Sours, supra* at 633; *ALZ, supra* at 272.

Respondent also argues that petitioner lacked standing to seek the termination of her parental rights to Destiny because he did not provide her with notice of the guardianship proceedings. However, this issue is waived because respondent did not include it in her statement of questions presented. MCR 7.212(C)(5); *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000). Nevertheless, we hold that respondent was collaterally estopped from challenging the guardianship order in the termination proceeding. The record shows that the guardianship order was litigated and adjudged in a prior and entirely separate case. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999), quoting *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Moreover, respondent's alleged failure to receive notice was not prejudicial here because the trial court recognized that she was Destiny's biological mother throughout the termination proceeding and gave her a full and fair opportunity to defend against the termination petition.[7]

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[7] We note that the allegedly erroneous factual findings made by the trial court regarded matters that were inconsequential in light of respondent's lengthy criminal history or regarded matters that occurred well before the statutory period. Therefore, such alleged errors were harmless and do not require reversal. Finally, we decline to address respondent's claim that the petition regarding Destiny "failed to state a ground for termination." This issue is not preserved and has been waived because respondent did not raise it below, *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001), include it in the statement of question presented, MCR 7.212(C)(5); *McGoldrick, supra* at 298, or provide any authority to support her argument, *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray